

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 16 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

RANDY DITH, et al.,

Plaintiffs - Appellants,

v.

CITY OF DOWNEY, et al.,

Defendants - Appellees.

No. 04-55863

D.C. No. CV-03-01040-PA

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted February 9, 2006
Pasadena, California

Before: KOZINSKI, TROTT, and BEA, Circuit Judges.

I

The Diths argue that the magistrate judge lacked probable cause to issue the search warrant for their apartment because Detective Romero's sworn statement of probable cause did not describe their particular apartment. *See* U.S. Const. amend.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

IV; Cal. Const. art I, § 13; *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *Greenstreet v. County of San Bernardino*, 41 F.3d 1306, 1310 (9th Cir. 1994). We reject this argument because the search warrant and affidavit incorporated by reference a description of the Diths’ particular apartment—a description to which Romero swore under oath.

The Diths also argue that the magistrate judge lacked probable cause to issue the search warrant for their apartment because Romero’s sworn statement of probable cause did not establish the reliability of his confidential reliable informant (C.R.I.). Under the totality of circumstances, however—particularly the narcotics purchase that the C.R.I. executed in cooperation with the police—our “common-sense” assessment is that Romero’s statement of probable cause established a “fair probability” that searching the Diths’ apartment would uncover “contraband or evidence of a crime.” *Gates*, 462 U.S. at 238.

Accordingly, without needing to address qualified immunity or municipal liability, we affirm summary judgment for the defendants on the Diths’ claim that the search warrant lacked probable cause.

II

The Diths also claim that Romero deceived the magistrate judge to obtain his search warrant. Having carefully considered the record and the Diths’ arguments,

we see no evidence that Romero deliberately or recklessly misled the magistrate judge. Thus, we affirm summary judgment for Romero on the Diths' judicial deception claim. *See Butler v. Elle*, 281 F.3d 1014, 1024 (9th Cir. 2002).

III

Finally, the Diths claim that the police officers executing the search warrant for their apartment failed to "knock and announce" as required by both the Federal Constitution and the California Constitution. U.S. Const. amend. IV; Cal. Const. art. I, § 13; *United States v. Bynum*, 362 F.3d 574, 579 (9th Cir. 2004); *People v. Uhler*, 256 Cal. Rptr. 336, 337 (Cal. Ct. App. 1989). The declarations of Tracy Martinez and Randy Dith create a genuine issue of material fact as to whether the police officers knocked and announced before entering the Diths' apartment. Thus, the district court erred in awarding summary judgment for the defendants on the Diths' knock-notice claim. *See Barlow*, 943 F.2d at 1134. Each party shall bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.